

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Public Inquiry Concerning the
Terms of 39 U.S.C. 404(d)

Docket No. PI2016-2

PUBLIC REPRESENTATIVE'S COMMENTS ON
THE COMMISSION'S ABILITY TO REVIEW POSTAL SERVICE
DETERMINATIONS TO CLOSE OR CONSOLIDATE ANY POST OFFICE

(February 5, 2016)

The Commission invited public comment on the Commission's interpretation of 39 U.S.C. § 404(d)'s language and intent relating to the sole source standard applied to contract postal unit (CPU) closings and consolidations as well as the relocation and rearrangement of postal retail facilities.¹ In response to these questions regarding the Commission's ability to review the Postal Service's determination to close or consolidate any post office, the Public Representative recommends that any jurisdictional interpretations issued by the Commission reconfirm the underlying statutory framework.²

¹ Notice and Order Seeking Comments on Commission Jurisdiction Over Postal Service Determinations to Close or Consolidate Post Offices, December 10, 2015, at 9-10 (Order No. 2862).

² The Commission states that the public may misunderstand the scope of the Commission's authority to review closings and consolidations. Order No. 2862 at 1. Regardless whether the Commission issues any jurisdictional interpretations, the Public Representative suggests that the Commission clarify the procedures and remedies available to the public. Although the Public Representative summarizes the procedures and remedies in part I, this summary focuses upon answering the specific questions asked by the Commission in this docket. The Public Representative recommends that the Commission issue guidance accessible to the public (e.g., question and answer, using limited jargon, framing a proceeding in chronological order) that focuses on very basic questions including who may institute or participate in a proceeding, how to do so, when to do so, and what relief may be available. This guidance would promote efficiency and reduce misunderstanding in proceedings.

I. Statutory Context to Interpret Commission Jurisdiction

Title 39 of the United States Code contains policies that may appear to be in tension with each other, including requiring the Postal Service to provide a certain level of service while affording the Postal Service operational flexibility.³ Congress commands the Postal Service to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.”⁴ To insure effective postal services to urban and rural communities, Congress prohibits the Postal Service from closing small post offices “solely for operating at a deficit.” 39 U.S.C. § 101(b). Further, the Postal Service must meet the needs of all users and all communities without undue or unreasonable discrimination.⁵

In 39 U.S.C. § 404(d), Congress balanced these concerns to ensure that the Postal Service gives the public notice and a meaningful opportunity to participate in the Postal Service’s decision-making process concerning retail facility closings and consolidations. The statute grants the Commission jurisdiction over (that is, the ability to consider) “[a] determination of the Postal Service to close or consolidate any post office.” 39 U.S.C. § 404(d)(5). The statute does not restrict the Commission’s ability to consider such proceedings. To maintain the Postal Service’s operational discretion, however, the scope of the Commission’s review and remedial power focuses upon ensuring that the Postal Service’s decision-making process complies with the statute.

Jurisdiction triggers Commission review; however, jurisdiction does not necessarily trigger a remedy. The Commission must set aside any Postal Service

³ See, e.g., 39 U.S.C. § 403(a) (“The Postal Service shall serve as nearly as practicable the entire population of the United States.”); *id.* § 403(b)(3) (requiring the Postal Service “to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services”).

⁴ 39 U.S.C. § 101(b). Moreover, the Postal Service must “provide prompt, reliable, and efficient services . . . in all areas and . . . to all communities.” *Id.* § 101(a).

⁵ See 39 U.S.C. § 403(b)(2) (requiring the Postal Service “to provide types of mail service to meet the needs of different categories of mail and mail users”); *id.* § 403(c) (prohibiting the Postal Service from unduly or unreasonably discriminating against or preferring any user).

determination, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, otherwise contrary to law, without observance of procedure required by law, or unsupported by substantial evidence on the record. *Id.* The Commission may not modify the Postal Service’s determination. *Id.* Instead, the Commission may return a decision to the Postal Service for further consideration. *Id.* Also, while the Commission is reviewing the decision, the Commission may suspend the proposed closing or consolidation during that review—for no more than 120 days. *Id.* If the Commission decides that it lacks jurisdiction over a closing or consolidation, that decision is generally not reviewable by a court.⁶

Interpreting jurisdiction is gatekeeping: jurisdiction to determine jurisdiction. Gatekeeping promotes efficient Commission review of Postal Service operational decisions that are obviously statutorily compliant. The Commission has interpreted that it may not consider CPU closings or consolidations that do not meet the “sole source” test, relocations, and rearrangements. When the Commission finds it lacks jurisdiction, it eliminates the public’s opportunity to challenge whether the Postal Service has afforded adequate process to the public concerning the closing or consolidation. To the public, a crucial difference between a Commission ruling to affirm a Postal Service decision versus dismiss that same proceeding for lack of jurisdiction is that a dismissal holds that the public is not entitled to the two statutory safeguards. Those safeguards are 39 U.S.C. § 404(d)(1)-(d)(4), providing the public with access to process via notice and the opportunity to have input in the Postal Service’s decision,⁷ and 39 U.S.C. § 404(d)(5), providing the public with the opportunity to seek Commission review of the

⁶ See *Mittleman v. Postal Regulatory Commission*, 757 F.3d 300, 307-08 (D.C. Cir. 2014) (holding that 39 U.S.C. § 404(d)(5) precludes Administrative Procedures Act review of Commission rulings that the Commission lacks jurisdiction to review a Postal Service determination to close or consolidate any post office).

⁷ It does not appear that the Postal Service affords the public any notice or opportunity to participate in decisions to close CPUs (absent perhaps an intervening Commission remand). See *generally* Docket No. N2012-2, Library Reference USPS-LR-N2012-2/5, United States Postal Service Handbook PO-101 (January 2012), May 25, 2012 (Postal Service-Operated Retail Facilities Discontinuance Guide).

adequacy of that process. Because the Commission’s jurisdiction is the sole oversight of the opportunity for public participation concerning these matters, the statute and the public interest demand that the Commission avoid unnecessarily constraining its ability to consider “[a] determination of the Postal Service to close or consolidate any post office.” 39 U.S.C. § 404(d)(5).

The Public Representative recommends against issuing generalized jurisdictional interpretations relying on specific facts. To do so would oversimplify the Commission’s analyses that it applies to a particular post office, particular methods to access postal services, and a particular community. Instead, any generalized jurisdictional interpretation issued by the Commission should reconfirm the statutory framework. The Commission may consider “[a] determination of the Postal Service to close or consolidate any post office.” 39 U.S.C. § 404(d)(5). The scope of Commission’s review focuses upon ensuring that the Postal Service’s decision-making process complies with the statute. Accordingly, the scope of the Commission’s remedial power focuses upon increasing the transparency and accountability of the Postal Service’s decision-making process by returning matters to the Postal Service for additional consideration.

II. The Commission’s Ability to Consider a CPU Closing or Consolidation

The statutory framework and Commission precedent confirm that the Commission has jurisdiction to review CPU closings and consolidations. The Postal Service has taken the position that the Commission lacks jurisdiction to review the closing or consolidation of any post office that is not a Post Office™ managed by a postmaster.⁸ The Commission has disagreed.⁹ Instead, consistent with the statute, the Commission defined any post office in its ordinary sense as a community’s retail facility

⁸ See, e.g., Docket No. A2006-1, *Observatory Finance Station, Pittsburgh, PA 15214-0651*, Order Denying Postal Service Motion to Dismiss and Remanding For Further Consideration, September 29, 2006, at 3-4 (Order No. 1480).

⁹ See, e.g., Order No. 1480 at 5-12 (rejecting the Postal Service’s position and reaffirming that the statute applies whenever the Postal Service seeks to close or consolidate a community’s retail facility).

for postal services, rather than extend any technical meaning to the term.¹⁰ “Interpreting ‘post office’ in the conventional senses comports well with the two broad, and sometimes conflicting policies of the Postal Reorganization Act, as amended—freedom to manage and responsiveness to the public.”¹¹ Congress amended 39 U.S.C. § 404 twice, but never altered the Commission’s long-standing interpretation of its jurisdiction to review the closing and consolidation of any post office.¹²

If the Commission reversed course and interpreted that it now lacks jurisdiction to review CPU closings and consolidations, those challengers deeming consolidations to be the beginning of the end would be prescient.¹³ This sudden reversal would be especially pernicious if the CPU closing occurred many years after the consolidation or if the community perceived that consolidation would result in a facility that would replace the Post Office™. Moreover, such a reversal would contradict the Commission’s

¹⁰ See, e.g., *id.* at 5-6; Docket No. A94-8, *In the Matter of Benedict, Minnesota 56436*, Commission Opinion Remanding Decision Under 39 U.S.C. § 404(b), August 3, 1994, at 7-8 (*Benedict*) (reaffirming that 39 U.S.C. § 404(b) applies whenever the Postal Service seeks to close or consolidate a community’s retail facility, including a Community Post Office (CPO), which the public generally describes as “post offices”); Docket No. A80-4, *In the Matter of Mt. Eden, California 94557*, Commission Opinion Affirming Determination 39 U.S.C. § 404(b)(5), May 28, 1980, at 22 (“[T]he term ‘post office,’ as used in § 404(b), is to be defined in its ordinary sense: ‘[A] fixed retail facility serving the public and acting as the point of origin for delivery routes. . . .’”).

¹¹ Docket No. A83-30, *In the Matter of Knob Fork, West Virginia 26579*, Commission Opinion Remanding Determination for Further Consideration 39 U.S.C. § 404(b)(5), January 18, 1984, at 7. Modern postal policies confirm Congress’ commitment to these two goals. See *supra* note 3.

¹² In 1998, Congress prohibited the Postal Service from using Occupational Safety and Health Act noncompliance as a basis for closings and consolidations. Compare 39 U.S.C. § 404(b) (1970) with 39 U.S.C. § 404(b) (1998). In 2006, Congress re-designated § 404(b) as § 404(d), updated the Commission’s name, and set how to determine an appeal’s receipt date. Compare 39 U.S.C. § 404(b) (1998) with 39 U.S.C. § 404(d) (2006).

¹³ See Docket No. A94-9, *In the Matter of Green Mountain, Iowa 50637*, Commission Opinion Affirming Decision Under 39 USC § 404(b), August 16, 1994, at 3 (*Green Mountain*) (“Mayor Odle emphasized his concern that the contract for a Community Post Office [CPO] might be cancelled, leaving the community with nothing but rural carrier service.”); *Benedict* at 6 (“Among the concerns expressed by Benedict residents was that the [CPO] established by the Postal Service would be closed at a later date.” and “[Resident] stated that a CPO is a step toward total elimination of retail service. . . .”); Docket No. A93-19, *In the Matter of Cataract, Wisconsin 54620*, Commission Opinion Affirming Decision Under 39 U.S.C. § 404(b), January 21, 1994, at 6 (*Cataract*) (“It appears that the petitioners’ real concern is that if CPO operations do not work out, the Cataract community will have no recourse if the Postal Service decides to close it at a later date. We share the petitioners’ concern.”).

statement in many proceedings involving consolidation of a Post Office™ to a CPO that the affected community would be able to seek Commission review if the CPO closed.¹⁴

The Commission restricted its jurisdiction to review CPU closings and consolidations to situations in which the CPU is the “sole source of postal services to the affected community.”¹⁵ Although the “sole source” test has become shorthand,¹⁶ this shorthand may cause misunderstanding because it inadvertently diminishes the impact of the other words in the test: postal services to the affected community. Without context, sole source literally means the single or only point of origin or procurement.¹⁷ Applying a literal sole source test, however, ignores the Postal Service’s statutory duty to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.” 39 U.S.C. § 101(b). Indeed, Commissioner Langley indicated that statutory postal policy is a critical determination related to considering Commission policy and rules regarding closures of CPOs and CPUs.¹⁸ If the Commission applied its “sole source” test in a manner that permitted elimination of a CPU that terminated effective or regular postal services to a community to escape Commission review, then the Commission would passively endorse the Postal Service failure to comply with the statute. The Commission must set aside any Postal Service determination, finding, or

¹⁴ *Green Mountain* at 5 (upholding consolidation to a CPO and noting that the Commission believes that both the statute’s procedural safeguards and appeal rights extend to CPO closures); *Cataract* at 6-7 (upholding consolidation to a CPO and noting that upon consolidating the Postal Service does not owe the public any promises concerning the CPO’s future but that the public could appeal any CPO closure decision to the Commission).

¹⁵ Docket No. A2015-2, *Careywood Post Office, Careywood, Idaho*, Order Dismissing Appeal, May 27, 2015, at 9 (Order No. 2505).

¹⁶ See, e.g., Order No. 2505.

¹⁷ Sole is defined as “only or single.” Merriam-Webster Online Dictionary, “sole,” <http://www.merriam-webster.com/dictionary/sole> (last visited January 19, 2016). Source is defined as “the point of origin or procurement.” Merriam-Webster Online Dictionary, “source (b)(1),” <http://www.merriam-webster.com/dictionary/source> (last visited January 19, 2016).

¹⁸ See Order No. 2505, Supplemental Views by Commissioner Langley.

conclusion in connection with closing or consolidating any post office that contradicts the Postal Service’s statutory duties.¹⁹

Using a jurisdictional bar as a gatekeeping mechanism promotes efficiency by streamlining the Commission’s review of so-called easy cases, which do not present obvious statutory concerns. Therefore, any generalized interpretation issued by the Commission of the “sole source” test should acknowledge the statutory considerations affecting the application of the “sole source” test. The Commission must take care not to limit its jurisdiction so as to permit elimination of a community’s access to effective or regular postal services without the statutory safeguards for process (39 U.S.C. § 404(d)(1)-(d)(4)) and Commission review (39 U.S.C. § 404(d)(5)). The Public Representative recommends that the Commission retain jurisdiction to review the elimination of a CPU that is the only point from which effective or regular postal services may be procured in the affected community.

III. Relocating (Moving) or Rearranging (Improving) Post Offices Within a Community

The Commission has determined that it lacks jurisdiction if the Postal Service provides a Postal Service-operated building within the community to replace the affected post office. A key distinction between these unreviewable in-community replacements (called relocations or rearrangements) versus reviewable closings and consolidations is whether the movement or improvement of retail services will afford customers “the same level of access to retail services in the community.”²⁰ A relocation or rearrangement thereby avoids disrupting effective or regular postal services.

Relocations should be limited to replacing the affected postal retail facility with another other postal retail facility within a very short distance inside the same

¹⁹ 39 U.S.C. § 404(d)(5) (“The Commission shall set aside any determination, findings, and conclusions found to be . . . not in accordance with the law.”).

²⁰ Docket No. A2011-21, *Ukiah Main Post Office, Ukiah, California*, Order Granting Motion to Dismiss, August 15, 2011, at 4 (Order No. 804).

community without reducing the community's access to retail services in a postal retail facility.²¹ “[T]he requirements of section 404([d]) do not pertain to the *specific building* housing the post office; but rather are concerned with the provision of a facility within the community.”²² Rearrangements should be limited to in-community transfers of postal retail services designed to improve the community's access to postal retail services.²³ “We do not believe that section 404([d]) was intended to govern the Postal Service's decisionmaking on *improving* or relocating *facilities within the community*.”²⁴ Because rearrangements and relocations improve or merely move retail services within a community, the Commission found that the Postal Service need not follow 39 U.S.C. § 404(d)(1)-(d)(4)'s procedures for public notice and the opportunity for comment.²⁵

²¹ See Docket No. A2015-3, Order No. 2546, *North Platte Post Office, North Platte, Nebraska*, Order Granting Motion to Dismiss, June 18, 2015, at 4-5 (transferring retail operations to a carrier annex about 1.5 miles away was an unreviewable relocation); Docket No. A2013-1, *Santa Monica Post Office, Santa Monica, California*, Order Granting Motion to Dismiss, December 19, 2012, at 4 (Order No. 1588) (transferring retail operations to a carrier annex under one mile away was an unreviewable relocation); Docket No. A2012-17, Order No. 1166, *Venice Post Office, Venice, California*, Order Granting Motion to Dismiss, January 24, 2012, at 6 (transferring retail operations to a carrier annex 400 feet across the street was an unreviewable relocation); Order No. 804 at 4 (transferring retail operations to a carrier annex one mile away from the main post office was an unreviewable relocation).

²² Order No. 1588 at 5 (quoting Docket No. A82-10, *Oceana Station, Virginia Beach, Virginia*, Order Dismissing Docket No. A82-10, June 25, 1982, at 6 (Order No. 436)).

²³ See Docket No. A2010-2, Order No. 448, *Sundance Post Office, Steamboat Springs, Colorado*, Order Dismissing Appeal, April 27, 2010, at 6 (refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement that would not eliminate any postal facilities in the community and would create a new post office); Docket No. A2007-1, Order No. 37, *Ecorse Classified Branch, Ecorse, MI*, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007, at 6 (refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement to create a new larger post office within the same community “to take over and replace the workload and retail services offered at the [prior building].”); Docket No. A2003-1, Order No. 1387, *In the Matter of Birmingham Green, AL, 35237*, Order Dismissing Appeal on Jurisdictional Grounds, December 3, 2003, at 6 (holding the Commission lacked jurisdiction to review a planned rearrangement to provide equal or superior service less than one-half mile away at a main post office, and establish a CPU near the prior building); Order No. 436 at 4-6 (holding the Commission lacked jurisdiction to review a planned rearrangement to enhance the Postal Service's network by opening a new main post office four miles from the prior building, improving services at nearby retail facilities, and opening a CPU in the area).

²⁴ Order No. 436 at 4-6 (emphasis added).

²⁵ The Postal Service provides the affected community with notice of relocations of Post Offices™ and an opportunity for comment. 39 C.F.R. § 241.4. The Postal Service does not appear to have a process in place to provide the affected community with notice and an opportunity for comment for rearrangements.

Relocations and rearrangements comprise a very limited subset of highly fact-specific outcomes. As a gatekeeper, the Commission has selected those instances, which would also warrant summary affirmance as compliant with statutory postal policies, for review under a jurisdictional bar. Expanding this jurisdictional bar to circumstances that are not so unquestionably compliant with statutory postal policy endangers the public's access to the statutory safeguards for process (39 U.S.C. § 404(d)(1)-(d)(4)) and Commission review (39 U.S.C. § 404(d)(5)). It would be imprudent for the Commission to issue a jurisdictional interpretation based on specific factual hypotheticals relating to facility geography, community demographics, and the available methods to access postal services.²⁶ To do so may prejudice a range of potential factual scenarios as failing to qualify for the statute's process and review safeguards.²⁷ Instead, the Commission should limit any generalized jurisdictional interpretation to reconfirming the statutory principle underlying its analysis concerning relocations and rearrangements: merely moving or improving postal retail facilities within a community falls outside the scope of 39 U.S.C. § 404(d) because the plan does not eliminate the affected community's access to effective and regular postal services.

²⁶ Indeed, analyzing any of these factors depends on the "community" affected by a specific proceeding. The Commission has not defined "community" in a sense that is generally applicable to all proceedings and does not solicit any generally-applicable definition in this docket.

²⁷ If presented with a specific Postal Service decision and particular circumstances that ultimately comply with statutory postal policy, yet require that the public retain the procedural safeguards of 39 U.S.C. § 404(d)(1)-(d)(4), the Commission could assert jurisdiction and summarily affirm the decision.

IV. Conclusion

Congress has long acknowledged that while postal policy may lack glamour, it does not lack importance:

The patient work on postal modernization has proceeded steadily even though, in all this time, “postal reform” has not once been featured on the Sunday talk shows. Balanced, nonpartisan postal reform may not be the stuff of political glory, but it is the sort of legislative work that will earn the long-term gratitude of the American mailing consumer—for I can think of no other government agency that touches the lives of all us, nearly every day, at home and at work.²⁸

Similarly, public opportunity to participate in Postal Service decision-making concerning closings and consolidations may ostensibly lack glamour but does not lack importance. Patrons consider postal services to be important and seek a way to offer meaningful input into Postal Service decisions that could diminish public access to regular and effective postal services. While Commission jurisdiction over closings and consolidations does not always result in remedial action, that jurisdiction preserves a meaningful opportunity for members of the public to participate in Postal Service decision-making affecting their community.

The Public Representative appreciates the Commission’s attention to reducing any misunderstanding by the public concerning the scope of the Commission authority to review closings and consolidations. Thus, the Public Representative urges that any generalized jurisdictional interpretation issued by the Commission reconfirm the statutory considerations affecting the Commission’s interpretation of its jurisdiction.

²⁸ 152 Cong. Rec. H9160, H9181 (daily ed. Dec. 8, 2006) (statement of Rep. McHugh).

Respectfully submitted,

Lauren A. D'Agostino
Public Representative

901 New York Avenue, N.W., Ste. 200
Washington, D.C. 20268-0001
(202) 789-6837; Fax: (202) 789-6861